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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EDWARD DAHL, Defendant and Appellant.	C058968 (Super. Ct. No. 07F07788)

A jury convicted defendant Robert Edward Dahl of second degree robbery (Pen. Code, § 211, 212.5, subd. (c); count one),[1] two counts of possession of a sawed-off shotgun (§ 12020, subd. (a); counts three & four), possession of a firearm by a convicted felon (§ 12021, subd. (a)(1); count five), and possession of narcotics paraphernalia (Health & Saf. Code, § 11364; count six). The jury acquitted defendant of another count of second degree robbery (count two). It found that he personally used a firearm in the commission of count one.

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[1] Further statutory references are to the Penal Code.

(§ 12022.53, subd. (b).) The trial court found true a serious felony allegation (§ 667, subd. (a)), a strike allegation (§ 667, subds. (b)-(i), 1170.12) and two prior prison term allegations (§ 667.5, subd. (b)), based upon a 2005 auto theft conviction and a 2002 first degree burglary conviction. Defendant was sentenced to state prison for 24 years eight months, consisting of six years (double the midterm) for robbery, 10 years for firearm use, five years for the prior serious felony, one year for a prior prison term, 16 months for possession of a short-barreled shotgun, and 16 months for possession of a firearm by a convicted felon. Sentence for the other count of possession of a short-barreled shotgun was stayed pursuant to section 654.

On appeal, defendant contends (1) the trial court should have instructed the jury on its own motion with CALCRIM No. 335 (June 2007 Rev.), and (2) the abstract of judgment must be corrected to reflect a count one conviction of robbery in the second degree, not first degree. The People concede the latter point. We affirm the judgment and order the abstract corrected.

FACTS

Prosecution Case-In-Chief

On the night of July 24, 2007, Veer Paul was working as a cashier at a convenience store in Sacramento County. On that evening a man entered the store with his face covered, pointed what appeared to be a sawed-off shotgun at Paul, and robbed him. The robber showed Paul the gun and told him to open the cash register, remove the cash tray, and place it on the counter.

Paul, who was in fear, complied with the robber's instructions and placed the tray, which contained about $80 to $100, on the counter. The robber picked up the tray and fled from the store. Paul activated the store's alarm system.

Paul described the gun as having an "iron rod" that was "kind of long in the front." In court he identified police photographs of a short-barreled shotgun as "looking like" the gun used in the robbery. The photographs depicted a short-barreled shotgun seized by police from defendant's person about two weeks after the robbery. Paul described the robber as having his face covered with a dark-colored bandana and his head covered by some sort of dark clothing, so that Paul could see only his forehead and eyes; he could, however, see that the robber had a white complexion. Paul was shown a blue bandana with white print and testified that the white print was similar to the print on the bandana worn by the robber. The bandana had been seized from defendant at the time of his arrest.

John Sharma, the manager of the store, arrived soon after the robbery and was able to provide surveillance video and photographs to law enforcement.

One week later, on July 31, 2007, Manpreet Dhillon was working as a cashier at a different convenience store in Sacramento. During the early morning hours, he was robbed by a man wearing "all black clothes," including some sort of black "scarf" over his face. The robber entered the store and pointed a gun directly at Dhillon. Dhillon described the weapon as an "old shotgun with a single pipe." The robber demanded that

Dhillon give him the cash register tray. Dhillon, who was in fear, did so and the robber took it and walked away, taking $80 to $100.

Dhillon testified that the robber was wearing all black colored clothing, including a black hooded sweatshirt, some kind of black "scarf" covering his face, and black gloves. Dhillon viewed photographs of the shotgun recovered from defendant and told police that the robber's gun "looked like the same shotgun" depicted in the photographs.[2]

Almost two weeks after the Dhillon robbery, Grant School District Police Officer Branche Smith was on patrol in North Highlands. At about 7:15 a.m., he saw someone sitting in a Volvo in a parking lot near some retail stores. After parking in a discreet location, Smith observed a White female in the driver's seat and a White male in the front passenger seat. Although several retail stores were nearby, only two -- a convenience store and a laundromat -- were open at that early hour.

After watching the Volvo for about 30 minutes, Officer Smith approached the driver's side and contacted the female, later identified as Jessie Renslow. After Renslow acknowledged that she was on probation with a search condition, Officer Smith had her step from the Volvo and told the male, identified as defendant, to keep his hands on the dashboard and not to move

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[2] Defendant was acquitted of this robbery.

while Smith spoke to Renslow. As Renslow stepped toward the patrol car, defendant began moving his hands away from the dashboard. After several commands, defendant placed his hands back on the dashboard. Smith secured Renslow in the patrol car and ordered defendant out of the Volvo at gunpoint. Smith asked defendant if he had anything illegal in his possession. Defendant answered that he had a sawed-off shotgun under his left armpit, as well as shotgun ammunition and a glass narcotics smoking pipe in the Volvo.

A backup officer arrived and removed the shotgun from defendant. Defendant was wearing a black hooded sweatshirt and a jacket over the sweatshirt. The shotgun was concealed between the jacket and sweatshirt, suspended from his shoulder by a shoe string "sling" so that the shotgun could quickly be swung up horizontally. The shotgun was loaded. Defendant also wore a bandana that was tied around his neck and arranged so that it could quickly be pulled up over his mouth and nose. Officer Smith thought the bandana was significant, evidently due to the proximity of the convenience store.

A search of the Volvo yielded 22 rounds of shotgun ammunition, a black bandana, block gloves, and the glass smoking pipe.

After he was advised of his constitutional rights, defendant told Officer Smith that he was lucky he had approached the Volvo on the driver's side, because if Smith had approached on the passenger side defendant had intended to shoot him through the car door.

Sacramento Sheriff's Detective Paul Biondi has been assigned to the robbery bureau for over five years and has investigated approximately 500 robberies. He characterized the use of a shotgun in a robbery as "kind of unusual," "fairly rare," and "rare." Handguns are used more often than shotguns.

Detective Biondi was assigned to investigate the July 24, 2007, robbery of Paul. He viewed the surveillance video, but he could not determine from the video who had committed the robbery and he had no leads or suspects.

A few weeks later, Detective Biondi was advised of Officer Smith's arrest of defendant on August 12, 2007. Biondi viewed photographs from the arrest and determined that the shotgun, bandanas, clothing, and gloves depicted in the photographs seemed to match the items in the surveillance video.

Detective Biondi then contacted Jessie Renslow, who was with defendant at the time of his arrest. At the time, Biondi was also investigating a convenience store robbery committed by a White female with a short-barreled shotgun. But after viewing surveillance video and questioning Renslow, Biondi concluded that Renslow was not responsible for that robbery. However, when Biondi showed Renslow the surveillance video of the female robber, Renslow identified the female as Jessica Bennett.

Detective Biondi arrested Bennett on an outstanding misdemeanor warrant. A search of her residence yielded a cash register tray taken in the July 31, 2007, robbery. Bennett then told Biondi that defendant had furnished the shotgun she had used in her robbery.

Jessica Bennett was called as a prosecution witness as part of a negotiated agreement in which she agreed to testify truthfully in exchange for a six-year prison sentence. During her testimony, Bennett was represented by counsel who was present in court.

Bennett testified that on July 24, 2007, defendant was a friend and a coworker who occasionally visited the apartment where she lived with her then-boyfriend Willie Harris. On the night of the 24th, Bennett drove defendant to Paul's convenience store in order to rob it. They both intended to rob the store. Bennett saw the shotgun, which was "sawed off" and "had electrical tape." She identified People's exhibit 31 as that shotgun.

Bennett testified that she parked around the corner from the store, watched as defendant entered the store wearing a black hooded sweatshirt, and then ran out a few minutes later with the cash register tray. Although she had not been promised any money, when they arrived back at her apartment defendant split the proceeds of the robbery with her. Later, the two dumped the cash register tray in someone else's trash can. This was the only robbery Bennett committed with defendant.

On July 27, 2007, Bennett decided to rob another convenience store. She committed this robbery by herself, with Harris as the driver. Using defendant's sawed-off shotgun, which was not loaded and which she had been storing at his request, Bennett robbed the store of $220 and gave $20 to Harris.

On the morning of July 31, 2007, Bennett awakened to find a cash register tray on her living room floor. The night before, Bennett had allowed defendant and Harris to use her car. They took the sawed-off shotgun when they left. Two weeks later, officers recovered the cash register tray when they searched Bennett's residence.

Defense

The defense rested without presenting any evidence or testimony.

DISCUSSION

I

Defendant contends that Jessica Bennett was an accomplice as a matter of law. From this premise, defendant argues the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 335 (June 2007 Rev.) (Accomplice Testimony: No Dispute Whether Witness is Accomplice)[3], and erred prejudicially

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[3] CALCRIM No. 335 provides: "If the crime[s] of _____ *<insert charged crime[s]>* (was/were) committed, then _____ *<insert name[s] of witness[es]>* (was/were) [an] accomplice[s] to (that/those) crime[s]. [¶] You may not convict the defendant of _____ *<insert crime[s]>* based on the (statement/[or] testimony) of an accomplice alone. You may use the (statement]/[or] testimony) of an accomplice to convict the defendant only if: [¶] 1. The accomplice's (statement/[or] testimony) is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's (statement/[or] testimony); [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime[s]. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the

by instead giving CALCRIM No. 334 (June 2007 Rev.) (Accomplice Testimony Must Be Corroborated: Dispute Whether Witness is Accomplice). Defendant's argument fails because its premise is incorrect.

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.) "A court can decide as a matter of law whether a witness is an accomplice *only* when the facts regarding the witness's criminal culpability are clear and undisputed. [Citation.]" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161; original italics; fn. omitted.) The bench notes to CALCRIM No. 335 state: "Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. [Citation.]" (Judicial Council of Cal. Crim. Jury Instns. (2008) CALCRIM No. 335, p. 108.)

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statement/[or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] [The evidence needed to support the (statement/[or] testimony) of one accomplice cannot be provided by the (statement/[or] testimony) of another accomplice.] [¶] Any (statement/[or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/[or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

Defendant claims the trial court should have declared Bennett an accomplice as a matter of law because the "facts surrounding Bennett's involvement in the instant case were undisputed." But rather than proving that there was no dispute, defendant simply notes that Bennett "admitted being centrally and heavily involved in the planning and execution of the July 24th robbery." Following lengthy excerpts of her testimony, which contain the claimed admission, defendant simply concludes that Bennett "was subject to being charged with the same offense as [him], and was therefore an accomplice as a matter of law."

The parties overlook the legal significance of defendant's trial counsel's summation, which *disputed* whether Bennett had participated in the count one robbery, *either* as a direct perpetrator *or* as defendant's accomplice. Trial counsel argued: "Jessica Bennett when interviewed by Detective Biondi and his partner, Officer Wright on August the 14th is asked point blank specifically, [h]ave you committed any other robberies other than the robbery that you just admitted to on July the 27th? And she says, *No, no other robberies.* . . . She . . . then changes her story on February 5th, and says, *Well, I actually was involved in a different robbery contrary to what I said on August the 14th*. I was involved in that robbery on July the 24th. I drove [defendant] to that robbery. We had an agreement that we were going to rob this place, and I drove him over there, parked the car about a block, a block and a half away from the [convenience store], and he left and returned about ten minutes later. Cash register till in one hand, shotgun in the

other. And, yes, I was involved. What's changed in the meantime from August the 14th to February 5th? [¶] For one, she was arrested for her own robbery, made the initial offer of 12 years. And I submit to you she must have been, probably is scared of going to prison doing 12 years. What's changed since then? Well, through her robbery, she connects herself to the shotgun owned or possessed by [defendant]. Probably figured at this point, at a minimum going down for possession of the firearm, why not try to tie him into these other robberies and point the finger at him. It's benefiting her. What do we know? On February 5th, she entered into a contract with the District Attorney's Office. As a result of that contract, her offer was reduced from 12 years to six years." (Italics added.)

By this argument, defendant's trial counsel contended that Bennett had fabricated *her own* participation in the July 24 robbery, *in order to* fabricate defendant's participation, *in order to* reduce her prison exposure from 12 years to six. Simply put, trial counsel's theory was that Bennett was a liar, *not an accomplice*.

Defendant's trial counsel returned to this theme after discussing victim Veer Paul's description of the shotgun. Counsel argued, "Who had access to the shotgun? Jessica Bennett had access to the shotgun. Her female roommate had access to the shotgun. Roommate's boyfriend, who is described as Mexican American and black. I don't know what his skin complexion is. Approximately six feet tall and skinny as she described him as well. He had access to the shotgun. Her boyfriend Willie

Harris had access to the shotgun. . . . [¶] Could one of them had [*sic*] possibly done it? I submit to you that they could."

Here, again, trial counsel's argument that "one" of the others could have committed the robbery suggested that Bennett was not involved, either as a perpetrator or as an accomplice of defendant.

Trial counsel's summation thus demonstrated that the "facts and the inferences to be drawn therefrom" were *disputed*; thus, the issue whether Bennett was an accomplice remained "a question of fact for the jury." (*People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 103.) The trial court properly instructed the jury with CALCRIM No. 334 and had no sua sponte duty to give CALCRIM No. 335.

In fact, giving the latter instruction would have been error because it would have signaled the trial court's rejection of counsel's argument that Bennett was a liar but *not an accomplice*. An instruction that, "If the crime of second degree robbery in count one was committed, then Jessica Bennett was an accomplice to that crime" would have effectively precluded the jury from considering the defense contention that a third party committed the robbery. (See fn. 3, *ante*.)

Alternatively, any error could not have been prejudicial. Defendant reasons that the jury convicted him because it had been "erroneously authorized to find Bennett was not an accomplice." But the only factual basis for a finding that Bennett was not an accomplice was the one trial counsel had argued in summation: a third party committed the robbery. No

rational juror who so found would have convicted defendant of count one. The guilty verdict was surely unattributable to the fact the jury had the option of finding that Bennett was not an accomplice. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L.Ed.2d 182, 189].)

II

Defendant contends, and the Attorney General properly concedes, part 1. of the abstract of judgment must be corrected to reflect a count one conviction of "ROBBERY 2nd DEGREE," not "ROBBERY 1st DEGREE."

In addition, part 1. of the abstract must be corrected to show that defendant was "convicted by" jury, not plea, on counts one, three, four, and five.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to show convictions by jury and a count one conviction of second degree robbery. The court is further directed to send a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

SIMS, J.